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PETITION FOR WRIT OF CERTIORARI

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No. 86-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF MONTANA,

Petitioner,

v.

FRANKLIN T. HALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

1. May a defendant convicted pursuant to a legally defective information be retried for the charge originally filed where the defendant introduced the error by moving immediately prior to trial to have the original charge dismissed and to instead be tried pursuant to the *ex post facto* application of an amended statute?

2. Should a determination of whether offenses are identical for purposes of double jeopardy analysis be based upon an examination of the statutory provisions or upon the facts of an incident?

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at 728 P.2d 1339. (App. 1a).

JURISDICTION

The state court opinion was filed on December 2, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

2. Mont. Code Ann. § 45-5-502 (1981):

Sexual assault. (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years and may be fined not more than $50,000.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 14 years old and the

offender is 3 or more years older than the victim.

3. Mont. Code Ann. § 45-5-507 (1983):

Incest. (1) A person commits the offense of incest if he knowingly marries, cohabits with, has sexual intercourse with, or has sexual contact as defined in 45-2-101 with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter. The relationships referred to herein include blood relationships without regard to legitimacy, relationships of parent and child by adoption, and relationships involving a stepson or stepdaughter.

(2) Consent is a defense under this section to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old.

(3) A person convicted of incest shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

4. Mont. Code Ann. § 45-5-613 (1981):

45-5-613. Incest. (1) A person commits the offense of incest if he knowingly marries or cohabits or has sexual intercourse with an ancestor, a descendant, a brother or sister of the whole or half blood. The relationships referred to herein include blood relationships without regard to legitimacy and relationships of parent and child by adoption.

(2) A person convicted of incest shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

5. Mont. Code Ann. § 46-11-502(4) (1985):

Prosecution when conduct constitutes more than one offense. When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

....

(4) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct ....

STATEMENT OF THE CASE

On November 16, 1984, an information supported by an affidavit for leave to file was filed in the district court in Yellowstone County, Montana, charging defendant, Franklin T. Hall, Sr., with felony sexual assault. The affidavit in support of the information included the statement that the victim of the alleged sexual assault was the 12-year-old stepdaughter of the defendant. Defendant was released on $5,000 bond that same day for the pendency of the trial court proceedings. The information was amended on

February 26, 1985, to change the date of the alleged offense from June 3, 1983, to on or about July 2, 1983.

Trial was set for Monday, November 4, 1985. At 3:51 p.m. on Thursday, October 31, 1985, defendant filed a motion to dismiss the amended information. (App. 19a.) The motion was noticed to be heard at 9:00 on the morning of trial as the jury panel awaited *voir dire* (App. 23a.) The basis for the motion was that since the affidavit in support of the information had alleged a stepparent-stepchild relationship between the defendant and the victim, it took the offense out of the sexual assault statute and placed it within the framework of the incest statute. (App. 20a-22a.) Defendant contended that if the State actually proved incest because the family relationship alleged in the affidavit was established, he would be entitled to a dismissal on the

sexual assault charge on the basis that the State had not proved its case.[1]

The district court granted defendant's motion and allowed the State to file an information charging defendant with incest. While that information was being prepared, the court proceeded with *voir dire* and the jury was impaneled. The State introduced uncontroverted evidence that defendant was the only father the victim had ever known and that he maintained a relationship with the stepchildren after he and the victim's mother split up. Defendant presented an alibi defense and introduced evidence that he and the victim's mother were divorced. He then moved for a directed verdict on the grounds that the State had failed to establish a stepparent-stepchild relationship as a matter of law. That motion was denied. Defendant offered no jury instruction defining "stepparent."

[1]Defendant recognized at the hearing that different defenses were available for the two offenses and also noted the disparity in the potential sentences for the two offenses. The maximum sentence for sexual assault is 20 years. Mont. Code Ann. § 45-5-502(3). The maximum sentence for incest is 10 years. Mont. Code Ann. § 45-5-507(3). The State objected to dismissal of the sexual assault charge since where a transaction may establish commission of more than one offense, a person may be charged with the commission of each such offense, and because the charge is properly a matter of discretion for the State. The State prosecutor argued that the information had served to put defendant on notice of the offense for which he was charged and allowed him to prepare a defense to that charge. Finally, the State noted that under the facts of the instant case, the stepparent-stepchild relationship was not at all clear. (App. 24a-34a.)

The jury returned a verdict of guilty on November 6, 1985. Defendant was sentenced to ten years in Montana State Prison, with five years suspended. He filed an appeal with the Montana Supreme Court in which he argued that the State had failed to establish the date of the offense or whether defendant was a stepparent of the victim and in which he challenged several jury instructions. Defendant was released on bond pending appeal.

On March 5, 1986, the State filed a motion with the Montana Supreme Court asking that court to stay proceedings on the issues presented by defendant on appeal. (App. 11a.)[2] The State asked the court to consider issues presented by the discovery that an amended statute had been

[2]In researching the issue of whether defendant was a stepparent of the victim, it came to the State's attention that Montana's incest statutes were amended in 1983. Prior to amendment, the statute applied to natural and adoptive parents where sexual intercourse without consent occurred. The 1983 amendments expanded the definitions under the incest statute to include the stepparent-stepchild relationship and to prohibit sexual contact. The amendment was enacted on April 21, 1983, and became effective October 1, 1983. The sexual contact in the instant case occurred on or about July 2, 1983. Apparently neither the court nor the parties recognized at trial that the amended statute was being applied retroactively. *See* Mont. Code Ann. § 45-5-613 (1981) and Mont. Code Ann. § 45-5-507 (1983).

applied retroactively.[3] The Montana Supreme Court stayed the proceedings with respect to the original issues and set a briefing schedule on the new issues raised. (App. 35a-36a.) In its opinion, the state court held that the original conviction was void because the amendments to the incest statute had been improperly applied *ex post facto* to an act which was noncriminal on July 2, 1983. (App. 3a-4a.)[4] The state court then held that double jeopardy precluded retrial of defendant on a charge of sexual assault because under the facts of the instant case, the series of acts committed by defendant "which were necessary to convict him of incest, are the same series of acts which are necessary to convict [him] of sexual assault." (App. 7a-8a.) The state court therefore held that in this case, the statutory elements for

[3]Those issues were: (1) whether defendant's conviction for sexual assault pursuant to the *ex post facto* application of an amended statute was void; (2) whether defendant's failure to object at trial to being tried pursuant to an inapplicable statute barred the state supreme court from considering the issue; and (3) whether the double jeopardy clause would preclude trial of the defendant on the sexual assault charge originally filed in this case where defendant not only acquiesced to trial on an inapplicable statute, but invited the error by moving that the information be amended to charge a nonexistent offense.

[4]The State properly conceded that the amendment had been improperly applied retroactively to an act which was noncriminal *under the incest statute* in effect on July 2, 1983. However, the State disputes the state court's holding that defendant's acts on that date were *noncriminal*. Those acts clearly constitute criminal conduct under the sexual assault statute.

both offenses are essentially the same. Finally, the state court held that a defendant convicted pursuant to a legally defective information has been subject to jeopardy and may never be retried. (App. 9a.)

STATEMENT OF THE FACTS

On or about July 2, 1983, the victim, 12-year-old H. D., visited her stepfather, Franklin T. Hall, Sr., at his trailer. The defendant, Franklin T. Hall, Sr., had picked H. D. up from her mother's home. When he was in town, he often took one or the other of his stepchildren to his trailer so that they could do his laundry and clean for him. On this occasion, defendant took H. D. to K-Mart to buy her a pair of sandals for a wedding in which she was going to be a candlelighter. H. D. did his laundry at a laundromat. They then returned to the trailer.

Defendant called H. D. over to sit on his lap in his recliner. He touched and squeezed her in the vaginal area. He attempted to force his hand up under H. D.'s shirt. He kissed her and french-kissed her. She did not consent. This conduct was repeated several times over the course of the weekend. No evidence was introduced during the incest trial

to establish that H. D. was not defendant's spouse.[5] Defendant was 31 years old at the time of the notice of divorce he filed on June 2, 1965. That notice was introduced into evidence as Defendant's Exhibit B.

REASONS FOR GRANTING WRIT

The State of Montana petitions this Court for a writ of certiorari because the state court in its judgment below has decided a federal question in a way that is in conflict with

[5]Proof that the victim is not the defendant's spouse is not necessary under Montana's incest statute since that is not an element of the offense. *See* Mont. Code Ann. § 45-5-507. It is an element of sexual assault. Mont. Code Ann. § 45-5-502. The State's case did not fail for insufficient evidence where it failed to prove something which was not an element of the offense being tried. That element was alleged in the affidavit in support of leave to file the original information charging sexual assault and will be established on trial of that charge.

applicable decisions of this Court.[6] The state court held that where the defendant was convicted on a legally defective information, double jeopardy precludes retrial. The state court further held that the offenses of incest and sexual assault are the same in law and in fact because the facts of the instant case would support either charge. The state

[6]The state court's opinion with respect to the issues concerning the double jeopardy clause rests primarily upon federal law. While the state court did mention Montana Constitution, Art. II, § 25, the discussion of that provision was interwoven with the state court's consideration of the Fifth and Fourteenth Amendments to the United States Constitution and with this Court's prior opinions on double jeopardy. To the extent a state procedural bar exists which could deprive this Court of jurisdiction, the state court here did not actually rely upon it. *See Caldwell v. Mississippi*, 472 U.S. 320, 326-28 (1985). This Court may consider a state court decision which fairly appears to rest primarily upon federal law or to be interwoven with federal law, particularly where the adequacy and independence of a possible state law ground is not clear from the face of the opinion. *See also New York v. Class*, 106 S. Ct. 960, 963-64 (1986); *Florida v. Meyers*, 104 S. Ct. 1852, 1853 n.* (1984); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Here, the state court relied almost exclusively upon federal case law in its opinion. Of the four Montana cases cited in the discussion of double jeopardy, three are founded upon prior opinions of this Court: *State v. Lindseth*, 203 Mont. 115, 659 P.2d 844 (1983); *State v. Wells*, 202 Mont. 337, 658 P.2d 381 (1983); *State v. Hembd*, 197 Mont. 438, 643 P.2d 567 (1982). [Note: *Hembd* did not, as the state court asserted (App. 9a), involve a situation in which a defendant was convicted of a nonexistent offense which therefore barred a subsequent prosecution. Rather, the reprosecution was barred because defendant's conviction and acquittal on two lesser included offenses served as an implied acquittal on the greater offenses.] Only *State v. Parmenter*, 112 Mont. 312, 116 P.2d 879 (1941), is not based upon federal law. That decision precedes the state court's adoption of the *Blockburger* analysis in *State v. Davis*, 176 Mont. 196, 199, 577 P.2d 375, 377 (1978).

court's identity-of-offense analysis misconstrued this Court's holding in *Brown v. Ohio*, 432 U.S. 161 (1977). Its double jeopardy discussion also misinterprets this Court's holdings and the double jeopardy analysis set forth in *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Ohio v. Johnson*, 467 U.S. 493 (1984), and *Burks v. United States*, 437 U.S. 1 (1978). The lower court decision is in clear conflict with these decisions and with others cited in the discussion below. The state court holding requires review and reversal.

I. THE STATE COURT IMPROPERLY HELD THAT DOUBLE JEOPARDY PRECLUDES RETRIAL OF A DEFENDANT CONVICTED PURSUANT TO A LEGALLY DEFECTIVE INFORMATION.

In the instant case, the state court appears to have held that defendant's conviction for a nonexistent crime was due to a legally defective information, which was fatal to a valid conviction. (App. 9a.) In spite of the fatal defect, defendant was subjected to jeopardy and that bars retrial. (App. 9a.) Additionally, the state court improperly held that the offenses of incest and sexual assault are the same in law and in fact. (App. 8a.) *See* Section II, *infra*. These holdings are in direct conflict with previous rulings of this Court.

This Court has long recognized that where a defendant's criminal conviction is set aside based upon trial

error, double jeopardy does not preclude retrial. *United States v. Ball*, 163 U.S. 662, 671-72 (1896).[7] The right of an accused to be given a fair trial must be balanced against society's interest in punishing one whose guilt is clear after he has received a fair trial. *United States v. Tateo, supra*, n.7, 377 U.S. 463 (1964). In *Tateo*, this Court stated:

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves

[7] *See also Oregon v. Kennedy*, 456 U.S. 667, 676 n.6 (1982); *United States v. DiFrancesco*, 449 U.S. 117, 130-31 (1980); *Burks v. United States*, 437 U.S. 1, 8-16 (1978); *United States v. Wilson*, 420 U.S. 332, 341 n.9 (1975); *North Carolina v. Pearce, supra*, 395 U.S. at 719-20; *United States v. Tateo*, 377 U.S. 463, 465 (1964); *Forman v. United States*, 361 U.S. 416, 425 (1960). While most of these cases involve situations where the defendant himself successfully sought review of his conviction, retrial is similarly proper in any situation where the defendant appealed his conviction. Here, defendant filed the appeal, but the State brought the reversible error to the attention of the state court. The principle that retrial is permitted where a conviction is reversed because of trial error is discussed in *Tateo*, 337 U.S. at 465, 467-68, and *Burks*, 437 U.S. at 8-9, 14-15. As in *Tateo*, had Hall in the instant case himself challenged the defective information on appeal, there would be no question that he could be retried.

> defendants' rights as well as society's interest.

Id. at 466.[8]

This Court has approved of retrial of a defendant for the same or additional offenses in numerous circumstances. *See Sanabria v. United States*, 437 U.S. 54, 63 n.15 (1978). Such retrials are permissible where the defendant successfully appeals his conviction,[9] where a mistrial is declared for "manifest necessity,"[10] where a defendant requests a mistrial in the absence of a prosecutorial or judicial overreaching,[11] and where an indictment is dismissed at a defendant's request in circumstances which are the functional equivalent of a mistrial.[12] Additionally, this Court has held that retrial is proper in situations where the defendant introduced error which required a second trial

[8]*See also Burks v. United States, supra*, 437 U.S. at 15; *United States v. Wilson, supra*, 420 U.S. at 343-44; *Illinois v. Somerville*, 410 U.S. 458, 463 (1973) (recognizing society's interest in fair trials designed to end in just judgments); *United States v. Jorn*, 400 U.S. 470, 483-84 (1971) (double jeopardy clause does not guarantee a defendant that the government will be prepared in every instance to vindicate society's interest in law enforcement through the vehicle of a single proceeding); *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949).

[9]See Note 7, *supra*.

[10]*See, e.g., Wade v. Hunter, supra*, Note 8.

[11]*See, e.g., United States v. Dinitz*, 424 U.S. 600 (1976).

[12]*See, e.g., United States v. Scott*, 437 U.S. 82 (1978); *Lee v. United States*, 432 U.S. 23 (1977) .

after a conviction had been entered on one or more other offenses that all or in part arose out of the same transaction.[13] Reprosecution is barred only where an acquittal has been entered on the offense charged[14] or where there has been a determination that insufficient evidence supported the verdict.[15] Neither of those situations is present here.[16]

Here, defendant may and properly should be retried on the original charge of sexual assault. He was convicted at

[13]*See, e.g., Ohio v. Johnson, supra*, 467 U.S. 493; *Jeffers v. Ohio*, 432 U.S. 137 (1977).

[14]*See, e.g, Sanabria v. United States, supra*, 437 U.S. 54; *Fong Foo v. United States*, 369 U.S. 141 (1962) (even if legal rulings underlying acquittal are erroneous); *United States v. Ball, supra*, 163 U.S. 662.

[15]*Tibbs v. Florida*, 457 U.S. 31, 39-44 (1982); *Greene v. Massey*, 437 U.S. 19 (1978); *Burks v. United States, supra*, 437 U.S. 1 (1978).

[16]The state court did gratuitously comment that "a defendant whose conviction is reversed, because the evidence is insufficient as a matter of law to sustain the conviction, cannot be retried." (App. 9a.) There is no indication in the opinion that the state court made such a finding, however. There is no analysis of the evidence introduced. The opinion focuses on the legal deficiencies of the information and whether the offenses of sexual assault and incest are the same in law and fact. (App. 1a-10a.) Nor did the state court apply the *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), standard set forth by this Court for use in determining the sufficiency of the evidence. That standard was adopted by the state court in *State v. Rodriguez*, ___ Mont. ___, 628 P.2d 280, 283 (1981), and has been consistently applied since then. *See, e.g., State v. McHugh*, ___ Mont. ___, 697 P.2d 466, 469-70 (1985); *State v. Kutnyak*, ___ Mont. ___, 685 P.2d 901, 910-11 (1984).

jury trial of the crime of incest. That conviction was overturned on the basis of a legal defect in the proceedings, rather than for insufficiency of the evidence. Defendant himself introduced the error into the proceeding by moving to be tried pursuant to the *ex post facto* application of an amendment to an existing statutory offense.[17] He should not be allowed to now use the double jeopardy clause as a double-edged sword to prevent his retrial on the proper charge.[18] Society's interest in being allowed to validly convict one who has committed a crime requires that defendant be retried. The state court holding requires review and reversal.

[17]Defendant's error was almost certainly inadvertent. The record suggests that defendant's motive in moving at the late date he did before trial to be tried for incest rather than sexual assault was extremely pragmatic. Under the facts of this case, the State would have a difficult burden in establishing a stepparent-stepchild relationship. (Even though the defendant was the only father the victim had ever known, he and the victim's mother were divorced long before the victim was born and the couple had not been living together for some time before the date of the charged offense.) Further, the maximum possible penalty for incest was only 10 years as compared to the possible 20-year sentence available under the sexual assault statute. The error amounts to negligence of the kind this Court recognized in *Lee v. United States, supra*, 432 U.S. at 34. There, the prosecutor negligently drafted a defective information which failed to charge the requisite mental state.

[18]*Ohio v. Johnson, supra*, 467 U.S. at 502.

II. THE STATE COURT IMPROPERLY BASED ITS DETERMINATION THAT THE OFFENSES ARE IDENTICAL FOR DOUBLE JEOPARDY PURPOSES UPON THE FACTS OF THE INCIDENT, RATHER THAN AN ANALYSIS OF THE STATUTORY ELEMENTS PURSUANT TO THE *BLOCKBURGER* TEST.

The state court determined that in the instant case the statutory elements for the defense of sexual assault and incest are the same (App. 8a.) The analysis was based upon a consideration of the defendant's conduct in repeatedly fondling his stepdaughter's genitals. The state court confused its analysis of the statutory elements of the two offenses with a discussion of Mont. Code Ann. § 46-11-502(4). That statute allows prosecution for more than one offense arising out of the same transaction, but precludes conviction of more than one offense where one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct. After discussing that provision, the state court then considered defendant's conduct in the instant case and held that the offenses of sexual assault and incest are the same in law and in fact because defendant could have been convicted of either offense in the instant case and because certain elements were proved by uncontroverted evidence introduced by the

State.[19] That analysis is improper and the state court's conclusion is faulty. The state court's reliance upon *Brown v. Ohio, supra,* 432 U.S. 161, in support of that conclusion (App.5a , 8a) is misplaced.

This Court has consistently applied the identity-of-offense analysis adopted in *Blockburger v. United States,* 284 U.S. 299, 304 (1932).[20] The *Blockburger* test to determine whether there are two offenses or only one is whether each statutory provision requires proof of a fact which the other does not. *Id.* at 304. In *Brown v. Ohio,* this Court relied upon its earlier discussion in *Ianelli v. United States,* 420 U.S. 770, 785 n.17 (1975), to recognize that the test emphasizes the statutory elements of the two crimes and that if each offense requires proof of a fact that the other does not, the *Blockburger* test is satisfied--even though there is substantial overlap in the proof offered to establish the crimes. 432 U.S. at 166.

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[19]For example, the State court found that "without consent" needed no separate proof as an element of sexual assault because the "stepdaughter was, at the time of the offense, under the age of 16 and the offender was more than three years older than the victim." (App.5a-7a.) That finding ignores the fact that those elements had to be and were in fact proved--the defendant simply did not dispute them in putting on his alibi defense.

[20]*See, e.g., Ohio v. Johnson, supra,* 467 U.S. at 499 n.8; *Illinois v. Vitale,* 447 U.S. 410, 415-16 (1980); *Brown v. Ohio, supra,* 432 U.S. at 166.

Here, the offenses of sexual assault and incest are separate and distinct. Each statute requires proof of a fact which the other does not.[21] It is clear from examining the statutes that sexual assault and incest are two separate offenses. In proving sexual assault, the prosecution must demonstrate that the defendant knowingly subjected another not his spouse to sexual contact without consent. Sexual assault requires proof that a particular legal relationship *does not* exist and that the contact was *without consent.* Conversely, proving a charge of incest requires proof that a person has married, cohabitated with, had sexual intercourse with *or* had sexual contact with an ancestor, descendent, brother or sister of the whole or half blood, stepson or stepdaughter. Incest requires proof that a certain legal

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[21]Sexual assault is defined as follows:

"*45-5-502. Sexual assault.* (1) A person who knowingly subjects another *not his spouse* to any sexual contact *without consent* commits the offense of sexual assault." [Emphasis added.]

Incest is defined as follows:

"*45-5-507. Incest.* (1) A person commits the offense of incest if he knowingly *marries, cohabits with, has sexual intercourse with,* or has sexual contact as defined in 45-2-101 with *an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter.* The relationships referred to herein include blood relationships without regard to legitimacy, relationships of parent and child by adoption, and relationships involving a stepson or stepdaughter." [Emphasis added.]

relationship *does* exist and that any *one* type of certain prohibited conduct occurred. The prohibited conduct which falls within the incest statute includes not only sexual contact, but marriage, cohabitation, and sexual intercourse. Lack of consent need not be established as an element of incest.

The offenses of sexual assault and incest are not identical for purposes of double jeopardy analysis. The state court erred in basing its analysis upon the facts of the instant case and in holding that the offenses are the same in law and fact.[22] Double jeopardy does not preclude defendant's retrial on the sexual assault charge. The state court holding requires review and reversal.

CONCLUSION

The petitioner, State of Montana, respectfully requests that the petition for a writ of certiorari be granted

[22]The state court seems to have stated that in *Brown v. Ohio* this Court held that the double jeopardy clause precludes multiple prosecutions for different offenses arising out of the same transaction. (App. 8a.) A close reading of *Brown v. Ohio* fails to disclose the basis for that conclusion. In any event, *see also Garrett v. United States*, 471 U.S. 773 (1985); *Sanabria v. United States*, *supra*, 437 U.S. at 74 n.33. These cases stand for the proposition that any determination of whether the government may prosecute a defendant multiple times for offenses arising out of the same transaction must be based upon an analysis of the statutory elements of the crimes to determine whether there is an identity of offenses. If there is not an identity of offenses, a second prosecution is not precluded by double jeopardy.

and that the state court's judgment below be summarily reversed. Alternatively, the petitioner requests that the petition be granted and that full briefing and argument be scheduled.

Respectfully submitted,

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January 1987

APPENDIX

APPENDIX

No. 86-023

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

STATE OF MONTANA,

Plaintiff and Respondent,

-vs-

FRANKLIN T. HALL, SR.,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, The Honorable Charles Luedke, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Moses Law Firm; Stephen C. Moses, Billings, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
Kimberly A. Kradolfer, Asst. Atty. General, Helena

Harold Hanser, County Attorney,
Billings, Montana
Curtis Bevolden, Deputy County
Attorney, Billings

Submitted on Briefs: June 23, 1986

Decided: December 2, 1986

Filed: Dec. 2 - 1986

Clerk

Mr. Chief Justice J. A. Turnage delivered the Opinion of the Court.

Hall appeals from a jury conviction of incest in the Thirteenth Judicial District Court, Yellowstone County. On December 17, 1985, Hall was sentenced to ten years imprisonment with five years suspended.

We reverse with instructions to dismiss the action.

Hall raises two issues for our review:

1. Does retroactive application of the incest statute void the conviction?

2. Does double jeopardy bar Hall's retrial on a charge of sexual assault?

On November 16, 1984, the State filed an information in Yellowstone County District Court charging Franklin T. Hall with felony sexual assault on July 3, 1983. The date of the charged offense was later amended to July 2, 1983.

On October 31, 1985, Hall moved to dismiss the State's information. Hall argued that the victim was Hall's twelve-year-old stepdaughter, and therefore the proper charge should be incest, which carried a lesser penalty and different elements of proof. The District Court agreed and dismissed the State's information. The State then filed a new information charging a violation of § 45-5-507, MCA, which provides:

> A person commits the offense of incest if he knowingly . . . has sexual intercourse with, or has sexual contact as defined in 45-2-101 with a . . . stepdaughter . . . A person convicted of incest shall be imprisoned in the state prison for any term not to exceed 10 years. . .

Issue No. 1

Does retroactive application of the incest statute void Hall's conviction?

The incest statute had been amended on April 21, 1983, effective October 1, 1983. The amendment added "stepdaughter" to the list of prohibited relationships. The controlling incest statute for Hall's acts on July 2, 1983, did not include a stepdaughter among the victims. The Court notes that this case proceeded through trial and sentencing, without Hall or the State noticing the effective date of the amended incest statute.

As applied to Hall, the State's retroactive enforcement of the amended incest statute violated Article II,

Section 31, of the 1972 Montana Constitution: "No ex post facto law . . . shall be passed by the legislature." This section is identical to Art. III, Sec. 11, of the 1889 Montana Constitution, under which we held: "[R]etroactive effect is not to be given to a statute unless commanded by its context, terms, or manifest purpose." Falligan v. School District (1917), 54 Mont. 177, 179, 169 P. 803, 804. We find nothing in the amended incest statute which permits retroactive application. The imposition of a sentence for a conviction, under statutes not in force at the time the offense was committed, is an ex post facto application of the law and therefore unconstitutional. State v. Gone (1978), 179 Mont. 271, 280, 587 P.2d 1291, 1297.

In its brief, the State admits that the incest statute was improperly and retroactively applied to an act which was noncriminal on July 2, 1982. The State further admits that the conviction is void but wishes to re-prosecute Hall on its original charge of sexual assault.

Therefore, we reverse the conviction for incest as a matter of law and proceed to the issue of retrial for sexual assault.

Issue No. 2

Does double jeopardy bar Hall's retrial on a charge of sexual assault?

The Fifth Amendment clause against double jeopardy is enforceable in Montana through the Fourteenth

Amendment. Benton v. Maryland (1969), 395 U.S. 784, 795, 89 S.Ct. 2056, 2063, 23 L.Ed.2d 707, 716. Furthermore, the Montana Constitution, Art. II, Sec. 25, states: "No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." Jeopardy attached in Hall's incest trial at the empaneling and swearing of the jury. Crist v. Bretz (1978), 437 U.S. 28, 38, 98 S.Ct. 2156, 2162, 57 L.Ed.2d 24, 33.

The double jeopardy clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. State v. Lindseth (Mont. 1983), 659 P.2d 845, 846, 40 St.Rep. 333, 335. North Carolina v. Pearce (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664-665.

If the offense charged in the second trial is the same in law and fact as the offense charged in the first trial, the double jeopardy clause prohibits successive trials. Brown v. Ohio (1977), 432 U.S. 161, 167, 97 S.Ct. 221, 226, 53 L.Ed.2d 187, 195, n. 6. In the instant case, double jeopardy is therefore predicated on whether Hall's incestuous conduct constituted the same offense in law and in fact as sexual assault.

Sexual assault is defined in § 45-5-502, MCA:

> A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault . . . If the victim is less than 16 years old

> and the offender is 3 or more years older than the victim . . . he shall be imprisoned in the state prison for any term not to exceed 20 years. . .

Hall's conduct consisted of repeatedly fondling his stepdaughter's genitals. Hall moved to dismiss the original charge of sexual assault, asserting that the proper charge should be incest, which carried a maximum sentence of only ten years. At the hearing on Hall's motion, the State's counsel argued that § 46-11-502(4), MCA, gives the State discretion to charge either sexual assault or incest. In pertinent part, that statute provides:

> When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. *He may not, however, be convicted of more than one offense if . . .* (4) *the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct . . .* [Emphasis added.]

In analyzing the "general" and "specific" conduct language, we note that the prosecution's proof of "sexual contact" is the same in both the incest statute and the sexual assault statute. Section 45-2-101(60), MCA, states: "'Sexual contact' means any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party."

As applied to Hall, the statutory elements of incest are (1) sexual contact, (2) knowingly, (3) with a

stepdaughter. The elements of sexual assault are (1) sexual contact, (2) knowingly, (3) with another without consent. Under the facts of this case, "without consent" requires no separate proof as an element of sexual assault because the stepdaughter was, at the time of the offense, under the age of sixteen and the offender was more than three years older than the victim. Section 45-5-502, MCA.

The first two elements of each offense are identical. The third element defines the victim. The victim of Hall's knowing sexual contact was his twelve-year-old stepdaughter. Therefore, under § 46-11-502(4), the "designated kind of conduct generally" refers to the sexual assault of anyone. The "specific instance of such conduct" refers to the sexual assault of Hall's stepdaughter.

The State supported this interpretation at the hearing on Hall's motion to dismiss, when it asserted:

> The State reads [46-11-502(4), MCA] to apply to the situation at hand as follows: In the instant case the facts involved support a charge of sexual assault. The facts involved also support a charge of incest. Because of the statute, 46-11-502(4), the State in its discretion has charged the offense of sexual assault, using the discretion given to it by the statute.

We agree with the State. A second prosecution of Hall for sexual assault would be based upon the same sexual contact with the same victim on the same dates as alleged in the incest charge. Hall's series of acts, which were

necessary to convict Hall of incest, are the same series of acts which are necessary to convict Hall of sexual assault. Thus, in Hall's case, the statutory elements for both offenses are essentially the same. As we held in State v. Parmenter (1941), 112 Mont. 312, 316, 116 P.2d 879, 880, double jeopardy in a second trial exists if the acts identified in the second information were admissible as evidence in the first trial and would have sustained a conviction under the first information.

Our analysis is supported by the State's own argument, later at the same hearing, where it asserted:

> The only difference between the two statutes [incest and sexual assault] is whether or not in this case the defendant is the stepfather of the victim . . . In any case, the defendant is not put at any disadvantage by the fact that we have charged sexual assault instead of incest, simply because incest and sexual assault are identical with the exception of the family relationship involved.

Hall repeatedly fondled his stepdaughter. Each act of fondling would now be an incest offense and a sexual assault offense. As we held in State v. Wells (1983), 658 P.2d 381, 389, 40 St.Rep. 127, 135, if a person could not commit one offense without committing the other, then the offenses are the same. Hall's incestuous conduct constituted the same offense in law and in fact as sexual assault. Therefore, the double jeopardy clause prohibits Hall's retrial. *Brown*, 432 U.S. at 167, n.6.

Furthermore, Hall was convicted of a crime which did not exist on the date of the charged offense. We discussed the conviction of a nonexistent crime and subsequent prosecution in State v. Hembd (1982), 197 Mont. 438, 643 P.2d 567. Hembd was convicted by jury of the nonexistent crime of "attempted misdemeanor negligent arson." We held that retrial for negligent arson would violate the prohibition against double jeopardy. *Hembd*, 197 Mont. at 440, 643 P.2d at 568.

Hall's conviction of a nonexistent crime was due to a legally defective information. The defect was fatal to a valid conviction. However, Hall was subjected to jeopardy and sentenced to five years imprisonment. Had Hall not appealed, the defect would have gone unnoticed and Hall would have been imprisoned. The prohibition against double jeopardy is designed to ensure that a defendant will not be forced to live in a continuing state of anxiety and insecurity. Ohio v. Johnson (1984), 467 U.S. 493, 498-499, 104 S.Ct. 2536, 2542, 81 L.Ed.2d 425, 433. More importantly, a defendant whose conviction is reversed, because the evidence is insufficient as a matter of law to sustain the conviction, cannot be retried. The purposes of the double jeopardy clause "would be negated were we to afford the government an opportunity for the proverbial 'second bite of the apple.'" Burks v. United States (1978), 437 U.S. 1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1, 13.

In conclusion, the State's prosecution of Hall in the original trial, on a charge of incest, bars Hall's retrial on a charge of sexual assault.

We reverse, with instructions to dismiss.

Chief Justice

We concur:

Justices

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 86-023

STATE OF MONTANA,

Plaintiff and Respondent,

-v-

FRANKLIN T. HALL, SR.,

Defendant and Appellant.

MOTION FOR COURT TO SET BRIEFING SCHEDULE ON NEWLY DISCOVERED ISSUES WHICH MAY BE DISPOSITIVE OF CASE

STATEMENT OF THE CASE

On November 16, 1984, an information supported by an affidavit for leave to file was filed in the district court in Yellowstone County charging defendant, Franklin T. Hall, Sr., with felony sexual assault. The information alleged that the act occurred on or about June 3, 1983. On December 10, 1984, defendant filed a statement of intention to rely upon the defense of alibi. On February 19, 1985, the State moved to amend the information to change the date of the offense from June 3, 1983 to July 2, 1983. That

motion was granted without objection on February 26, 1985. A waiver of speedy trial was filed on that same date.

Trial was set for Monday, November 4, 1985. At 3:51 p.m. on Thursday, October 31, 1985, defendant filed a motion to dismiss the amended information. That motion was noticed for 9:00 on the morning of trial as the jury panel awaited *voir dire*. It was argued at that time. The motion, brief in support of the motion, notice of hearing, and transcript of argument on the motion are attached hereto as Exhibits A, B, C, and D.

The basis for the motion was that the affidavit in support of the information had alleged a stepparent-stepchild relationship between defendant and the victim. Defendant contended that because the affidavit referred to a stepparent relationship, it took the offense out of the sexual assault statute and placed it within the framework of the incest statute. (Ex. D at 4.) Defense counsel indicated that he first discovered the difference between the sexual assault statute and the incest statute on October 31, 1985--even though the offense had been charged on November 16, 1984. (Ex. D. at 6-7.) Defense counsel noted that different defenses are available to the two offenses and that the penalty is substantially different (potential 20-year sentence for sexual assault; potential 10-year sentence for incest). He contended that it therefore affected the substantive situation with regard to this defendant. (Ex. D at 6.)

The State responded to defendant's motion to dismiss by correctly noting that where a transaction may establish commission of more than one offense, a person may be charged with the conduct for each such offense. He may not, however, be convicted of more than one offense if the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct. § 46-11-502, MCA. (Ex. D at 2-3.) The State noted that the information had served to put defendant on notice of the offense for which he was charged and allowed him to prepare a defense to that charge. (Ex. D at 3.) The State also noted that under the instant facts, it was not altogether clear whether the defendant was, in fact, the stepfather of the victim. (Ex. D at 8.)

Defense counsel argued further over the objection. He contended that if the State actually proved incest because the family relationship alleged in the affidavit was established, he would be entitled to a dismissal on the sexual assault charge on the basis that the State had not proved the case before it. He contended that the State was "stuck" with proving incest because the relationship had been alleged in the affidavit in support of the information. (Ex. D at 8-9.) Second, he again noted the difference in sentencing between the incest and sexual assault statutes.

The district court granted defendant's motion and allowed the prosecution the right to amend the information

based upon a charge of incest. (Ex. D. at 10-11.) The jury was empaneled. An amended information charging incest was filed that afternoon. The State introduced uncontroverted evidence that defendant was the only father the victim had ever known and that he maintained a relationship with the stepchildren after he and the victim's mother split up. Hall presented an alibi defense. He then moved for a directed verdict on the grounds that the State had failed to establish a stepparent relationship as a matter of law. That motion was denied. Defendant offered no jury instruction defining stepparent. A verdict of guilty was returned on November 6, 1985. Defendant moved for a new trial and sentencing. Those motions were argued and denied on December 17, 1985. This appeal followed:

On appeal, defendant contends:

1. The State failed to establish the date of the offense;

2. The State failed to establish that the defendant was a stepparent of the victim;

3. The court erred in failing to give defendant's Instruction No. 14; and

4. The court erred in giving State's Instruction No. 8 and refusing defendant's Instruction No. 13.

STATEMENT OF THE FACTS

On or about July 2, 1983, the victim, 12-year-old Heidi Duarte, visited her stepfather, Franklin T. Hall, Sr., at

his trailer. The defendant, Franklin T. Hall, Sr., had picked Heidi up from her mother's. When he was in town, he often took one or the other of his stepchildren to his trailer so that they could do his laundry and clean for him. (Tr. at 64, 113, 114.) On this occasion, defendant took Heidi to K-Mart to buy her a pair of sandals for a wedding in which she was going to be a candlelighter. (Tr. at 63, 64, 65.) Heidi did his laundry. (Tr. at 65.) They then returned to the trailer.

Defendant called Heidi over to sit on his lap in his recliner. (Tr. at 65, 66.) He touched and squeezed her in the vaginal area. (Tr. at 67.) He squeezed her breast. (Tr. at 68.) He attempted to force his hand up under Heidi's shirt. (Tr. at 68.) He kissed her and french-kissed her. (Tr. at 68.) She did not consent. (Tr. at 72.) This conduct was repeated several times over the course of the weekend. (Tr. at 63-74.)

MOTION

The respondent, State of Montana, respectfully requests that this Court stay the proceedings on the issues as presented by defendant. In the Statement of Procedure, *supra*, the State noted that defendant moved on the day of trial to have the sexual assault charges against him dismissed and to instead be tried on a charge of incest. In researching the issues as presented by defendant, it has come to undersigned counsel's attention that the incest statutes were

amended in 1983. Prior to amendment the statute applied to natural and adoptive parents where sexual intercourse without consent had occurred. The 1983 amendments expanded the definitions under the incest statutes to include the stepparent relationship and to prohibit sexual contact. The amendment was enacted on April 21, 1983. The effective date was October 1, 1983. The offense in the instant case occurred on or about July 2, 1983. Apparently neither the court nor the parties recognized at trial that an *ex post facto* law was being applied.

The State would ask this Court to set a briefing schedule for the issues which stem from this discovery by undersigned counsel. These issues may be dispositive of the instant case. The State therefore asks that the Court set a briefing schedule on the following issues:

1. The effect of *ex post facto* application of the statute in the instant case where defendant moved to be tried on this charge;

2. Whether this Court is precluded from considering the *ex post facto* application of the statute in the instant case where defendant invited the error, failed to preserve the issue by contemporaneous objection at trial, and did not raise the issue on direct appeal; and

3. Whether the double jeopardy clause would preclude trial of defendant on the sexual assault charge originally filed in this matter where defendant not only acquiesced to trial on that charge but invited the error with his motion and argument.

The State of Montana makes this motion in the interest of judicial economy where it is entirely possible that the issues as presented by defendant need not be reached by this Court.

Undersigned counsel would note that initial research on these issues has revealed extensive law in these areas. It will be necessary to thoroughly research the area in order to determine the appropriate way to proceed, however. The initial research does not reveal a definitive solution which would be dispositive of this case.

Respectfully submitted this 5th day of March, 1986.

MIKE GREELY
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620

By: _____
KIMBERLY A. KRADOLFER
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and accurate copy of the foregoing, postage prepaid, by U.S. mail, to the following:

Stephen C. Moses
Moses Law Firm
The Terrace-Penthouse
300 North 25th Street
P.O. Box 2533
Billings MT 59102

Harold F. Hanser
Curtis Bevolden
Yellowstone County Attorney's Office
Yellowstone County Courthouse
Billings MT 59101

DATED:_____ _____

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

STATE OF MONTANA,	) Cause No. DC 84-321
Plaintiff,	) JUDGE: Charles Luedke
vs.	) MOTION TO DISMISS
FRANKLIN T. HALL, SR.	)
Defendant.	)

COMES NOW the Defendant, Franklin T. Hall, Sr., and renews his Motion to Dismiss on the grounds and for the reason that the Information and the Affidavit in Support thereof do not charge the same offense.

DATED this 31st day of October, 1985.

MOSES LAW FIRM
The Terrace - Penthouse
300 North 25th Street
P.O. Box 2533
Billings, Montana 59103

By:_____
Stephen C. Moses

ATTORNEYS FOR DEFENDANT

EXHIBIT A

IN THE DISTRICT COURT OF THE THIRTEENTH

JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF YELLOWSTONE

STATE OF MONTANA,	) Cause No. DC 84-321
Plaintiff,	) JUDGE: Charles Luedke
vs.	) BRIEF IN SUPPORT OF MOTION TO DISMISS
FRANKLIN T. HALL, SR.	)
Defendant.	)

The Defendant was charged on November 16, 1984 with Sexual Assault (a felony) as specified in Section 45-5-502, MCA. At that time it was alleged that the Defendant had committed the offense on or about June 3, 1983. The affidavit in support alleged that the Defendant had had sexual contact with Heidi Duarte, Cheryl Hall, and Tammy Turner. The affidavit concluded with the following statement:

> "The defendant is the stepfather of each of the three victims."
>
> The victim of this particular event is Heidi Duarte.

The information was amended to change the date to July of 1983. Counsel had made a Motion at the Omnibus Hearing which was denied that this Information failed

EXHIBIT B

to state a claim. There is only a single issue which this Court should consider at the present time in which Defenant [*sic*] has discovered as a result of preparation for the trial.

> Sexual assault is defined in Section 45-5-502(1), MCA, as follows:
>
> "A person who knowingly subjects another, not his spouse, to any sexual contact without consent commits the offense of sexual assault."
>
> Section 45-5-507(1), MCA, states as follows:
>
> "A person commits the offense of incest if he knowingly marries, cohabits with, has sexual intercourse with, or has sexual contact as defined in 45-2-101 with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter."

Section 45-5-507, MCA, is not a lesser included offense of 45-5-502. It is a specific statute which deals with a specific set of relationships. Sexual contact becomes incest if it involves, as alleged victims, stepchildren.

The affidavit in support of leave to file states specifically that the alleged victims in this case are stepchildren to the Defendant. Therefore, the affidavit, on its face, does not support a charge of sexual assault under 45-5-502, MCA, but, if it supports a charge at all, supports the charge of incest under Section 45-5-5-7 [*sic*], MCA.

This is a substantial difference to the Defendant in that if the charge is sexual assault there is a substantially stiffer penalty and a difference in defenses. Sexual assault carries a penalty of 20 years while incest carries a maximum penalty of ten years. Further, since it is apparent from the affidavit and from the notice to bring other acts as evidence, the consent provisions of incest become important.

The State should be required to dismiss its charge against this Defendant with leave to file new charges under the incest statute if they so desire.

Respectfully submitted this 31st day of October, 1985.

MOSES LAW FIRM
The Terrace - Penthouse
300 North 25th Street
P.O. Box 2533
Billings, Montana 59103

By: _____
Stephen C. Moses

ATTORNEYS FOR DEFENDANT

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

STATE OF MONTANA,	) Cause No. DC 84-321
Plaintiff,	) JUDGE: Charles Luedke
vs.	) NOTICE OF HEARING ON MOTION TO DISMISS
FRANKLIN T. HALL, SR.,	)
Defendant.	)

TO: State of Montana, Plaintiff, herein and Yellowstone County Attorney's Office, its counsel of record:

PLEASE TAKE NOTICE that Defendant will bring on for hearing on the 4th day of November, 1985, at the hour of 9:00 o'clock A.M. in the Courtroom of the Honorable Charles Luedke, his Motion to Dismiss.

DATED this 31st day of October, 1985.

MOSES LAW FIRM
The Terrace - Penthouse
300 North 25th Street
P.O. Box 2533
Billings, Montana 59103

By: _____
Stephen C. Moses

ATTORNEYS FOR DEFENDANT

EXHIBIT C

WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD AND TAKEN IN CHAMBERS:

THE COURT: Criminal Cause DV 84-321, State of Montana versus Franklin T. Hall, Sr. The record may show that the Court has convened in chambers outside the presence of the jury. Present in person is the defendant, Franklin T. Hall, Sr., and his counsel, Mr. Stephen Moses; also, present on behalf of the plaintiff, Mr. Curtis Bevolden. The matter before the Court at this point is motion to dismiss filed by counsel for the defendant.

Mr. Bevolden, for the record, do you wish to respond to the motion that has been filed?

MR. BEVOLDEN: Yes, Your Honor. The state responds to defendant's motion to dismiss, first, relying upon Section 46-11-502(4) of the Monana Codes Annotated, which state, "When a transaction may establish commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." The state reads that particular statute to apply to the situation at hand as follows: In the instant case the facts involved support a charge of sexual assault. The facts involved also support a charge of incest. Because of the statute, 46-11-502(4),

EXHIBIT D

the state in its discretion has charged the offense of sexual assault, using the discretion given to it by the statute.

Secondly, defense is arguing the suit should be dismissed because the information charges sexual assault and the affidavit supports the charge of incest. We would reject that argument also, because the information has served to put the defendant on notice of the offense for which he is charged and is allowed to prepare a defense to that charge. A defense to either charge would be similar, and the defendant is put at no disadvantage or put at no surprise by the information and affidavit as they read now.

THE COURT: All right. Mr. Moses?

MR. MOSES: Your Honor, the defendant comes and states to the Court that the jurisdiction of the Court in this particular matter is raised when the county attorney files his affidavit and the Court is moved to establish the probability that the crime charged in the information has been committed.

Now, the charge here is sexual assault. Sexual assault charges the exact, same elements, if you will, of incest. It is a separate and distinct offense in that sexual assault is a charge against someone who has committed -- or had sexual contact with another who is a stranger. Whereas, incest is sexual contact with an

individual who has or is part of the relationship listed in the statute, which includes stepdaughters, which is what this is charged. The affidavit here charges that the defendant has had sexual contact with Heidi Duarte and states in the affidavit that that contact -- or that Heidi Duarte is a stepdaughter of the defendant. Therefore, it has taken it out of the sexual assault statute and placed it in the incest statute.

Now, the state would not be allowed to bring a charge for sexual assault and incest both, because they are basically individual offenses; have the same elements, so they're not lesser included offenses. They are two separate offenses, one if you have a relationship involving the family, one if you're talking about strangers.

Now, the state goes to 46-11-502(4). I've looked through the book here. Most of the cases that I can find are talking about kidnapping and assault. There's a case which I am very much involved with, two theft statutes. Or theft occasions. They didn't allow that because the thefts, one had started at one time, one had started at another time, so they found two thefts. Otherwise, they would have had to have just one. They're talking about a situation where you have a multitude of offenses that could be charged, and then they -- The state is entitled to charge whatever it wants. For instance, you may have a

kidnapping/murder/assault type arrangement. They could charge murder, kidnapping, assault, unlawful restraint, all of that. That's what 46-11-502 is for. The prosecutor has the discretion where there are a multitude of offenses, different offenses, which could be charged. Here we're talking about an offense that is specific. It says that if there's a relationship between the parties, then the state should charge incest. If there is no relationship, the state charges sexual assault.

I would direct the Court's attention, if I may, to State v. Jensen, where the court, citing some other cases, including Tiedeman here in the state of Montana, says that, "When a defendant is put upon trial for one offense, he should be convicted, if at all, by evidence which shows that he's guilty of that offense alone." So that if they're going to charge sexual assault here and they prove that there's a relationship of stepchildren and they prove the offense of incest, he should not be convicted of the offense of sexual assault.

And that's why I'm saying that what they have alleged here is incest in their affidavit in order to move the Court's discretion. Yet, they've charged him with sexual assault. It would be similar to coming up and saying, "We're going to charge this guy with burglary," and giving the Court an affidavit proving that he committed -- or

establishing facts or probable cause that he committed robbery. And saying, "Well, if the Court will find probable cause of robbery, we're charging him with burglary. We'll go to court on burglary." Now, of course, the defenses are different. These are substantive offenses, different offenses. The defenses that are available are different. The penalty is substantially different. And it affects the substantive situation with regards to the defendant.

Therefore, our position is that the state has alleged this relationship. They have alleged -- And I am not arguing about whether or not the affidavit is sufficient. What they have alleged is incest. And now they're charging him with a different offense of sexual assault, and I'm suggesting to the Court that that is an improper -- The Court's discretion, the Court's jurisdiction is in danger where they've alleged one offense and they charge him with another offense. Because now I'm not certain whether I have to defend against the one or the other.

And I will admit to the Court that my discovery of this particular situation was on Thursday when I filed the papers with the Court. It had not struck me at all until I was reading through and getting ready for the case. And that's when I discovered the difference between the two statutes as they are, and I filed the affidavit --

or my motion and my brief with both the county attorney and with the Court at that particular time on Thursday as soon as I discovered it.

But if we're going to charge him with one offense, got to charge him with the right one. Otherwise, this incest doesn't make any difference. The incest statute makes no sense. In this case it's specific. If it's between the parties who have a relationship, then it's incest. If it's between strangers, it's sexual assault. And in this case the government has alleged that it is between family members, stepchildren, and, therefore, the charge is wrong.

MR. BEVOLDEN: If I may, Your Honor, for the record, I'd like to say that the information was served upon the defendant in [*sic*] November 16th of 1984. just 12 days short of a year ago. Defense has had more than enough time to discover this defect, should have done so before last Thursday.

In addition to that, defense is saying there are two separate charges and two separate defenses for incest and for sexual assault. I can't really agree with that. The only difference between the two statutes is whether or not in this case the defendant is the stepfather of the victim. That's the only difference between the two statutes. I can't accept the fact that it would require two

different defenses and two separate ways of preparing for the case. I think in either case the defense would be virtually the same.

With the instant facts, it's not altogether clear whether the defendant is, in fact, the stepfather of the victim. Defendant no longer lives with nor is he married to the victim's mother and was not at the time the offense occurred. In any case, the defendant is not put at any disadvantage by the fact that we have charged sexual assault instead of incest, simply because incest and sexual assault are identical with the exception of the familial relationship involved.

MR. MOSES: The problem, judge, is that if they prove incest and the family relationship is alleged in the affidavit, I'm entitled to have a dismissal on the basis that they haven't proved the case before them.

Secondly, he sure is put at a disadvantage. The difference in sentencing is 10 years for incest and 20 for sexual assault. And that's a substantial -- substantial -- factor for the client.

Third, granted, the original information was filed in November. It was amended after we established a certain factor with regards to the date back in -- We had the omnibus hearing on the old information. And we alleged alibi. We established that the dates involved for which

they charged were wrong, and the government came in and got permission to amend to add a different date, change the date. And since then we have had no hearings or anything else between counsel, and we've worked fairly hard on this case. And I think that the problem which I now find in the information, they've alleged the relationship. They have alleged incest. And they're stuck with that. And they've got to make up their mind one way or the other, because it makes a difference to me in my defense. And furthermore, it makes a substantial difference if there's a conviction in this case as to the sentencing involved.

THE COURT: Gentlemen, I have a grave concern about proceeding through a trial with the waters muddied as much as this situation causes it to be. But this case has been pending for some considerable period of time, and certainly with the contents of the affidavit, everybody's been apprised of the general evidenciary circumstance that is involved.

Mr. Moses, what would be your position if the Court were to grant the relief you have requested this morning with respect to future handling? Would you be in a position to, if the pleading were straightened out, to go ahead with the trial, considering the fact that the basic background has been exposed right from the very beginning? So there shouldn't really be any surprises.

MR. MOSES: Proceed today with the trial?

THE COURT: Today, tomorrow. I would like to get the matter handled this week, if it's possible to do so.

MR. MOSES: I would like to get the matter handled, Your Honor. Obviously, I am here, and I am ready to go. But I am concerned about the -- I mean, we can go on this one if the Court decided to go on this one, but if they do, the Court's aware that I'm going to come after the basis that they've alleged. Any my understanding is from the statements of everyone that they're going to testify that he's the stepfather. And if they prove incest, we're going to have a real problem come trial time.

THE COURT: Well, my question is based on the assumption that your motion was granted.

MR. MOSES: If my motion is granted, your Honor, I'm basically prepared to proceed. Assuming that we can do that. I think that what's -- The problem with it, I think, is that the state's going to have to go back in and amend their affidavit and file their motion and have him enter a plea, and then we should proceed from there. But I'm prepared. I mean, on short notice, we're prepared to go, basically.

THE COURT: All right. Well, for the record, I think your motion is well taken. Enough so, at least, that I do not think we can justify all of the expense and work

involved in going through a trial and have the jeopardy of that defect hanging. So my suggestion would be, since there really isn't any surprise in the evidence, that we go ahead and get the jury selected this morning.

And then that will give your office, Mr. Bevolden, an opportunity by this afternoon to have prepared an amended information and amended affidavit, if that is your choice to do so. And then we can go ahead and get this matter handled.

MR. BEVOLDEN: Okay.

THE COURT: Does anyone now have any real, serious objection to following that procedure? Now, let me make sure that it's clear. I will grant the motion to dismiss. I will grant the prosecution the right to amend, if that is their choice. And in the interim we will go ahead and select the jury. And the amendment will be effectuated by this afternoon, and we will go into trial based on the amended information. Now, we'll say that in the event the amendment comes up with some surprises, why, I guess we'll have to treat that at the time of surprise or discovery, if any.

MR. BEVOLDEN: In that event, with what you've just said, Your Honor, I would anticipate the amended information would read a charge of incest rather than aggravated assault (sic). The affidavit would remain the

same. And therefore, we'd minimize any surprises to the defendant.

THE COURT: All right. Mr. Moses? Do you want an opportunity to discuss this with your client?

MR. MOSES: Let me talk about this with my client, Your Honor, because there are cerain time rights that he has, and I want him to understand before he waives them. As the Court's aware.

THE COURT: All right.

MR. MOSES: If I could have about five -- two minutes?

THE COURT: All right.

MR. MOSES: We'll just step outside, if that would be all right.

THE COURT: Yes.

(Brief recess taken.)

MR. MOSES: Your Honor, for the record, the defendant is now present. We have discussed his rights on pleading if there's a change, and he has indicated that he would waive any time elements with regard to the entry of plea, would enter a plea immediately, if they should amend, and would waive any time to prepare, and we can proceed on to trial.

THE COURT: All right. While you were out, Mr. Bevolden did mention that he may want to add one

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 86-23

STATE OF MONTANA,

Plaintiff and Respondent,

v.

FRANKLIN T. HALL, SR.,

Defendant and Appellant.

ORDER

PER CURIAM:

The State of Montana, plaintiff and respondent, having filed a motion March 5, 1986, setting a briefing schedule on newly discovered issues,

IT IS ORDERED that further proceedings in the appeal of the above entitled matter is stayed until further order of this Court.

The following issues shall be briefed by the parties to this appeal:

1. The effect of *ex post facto* application of the statute in the instant case where defendant moved to be tried on this charge;

2. Whether this Court is precluded from considering the *ex post facto* application of the statute in the instant case where defendant invited the error, failed to preserve the issue by contemporaneous objection at trial, and did not raise the issue on direct appeal; and

3. Whether the double jeopardy clause would preclude trial of defendant on the sexual assault charge originally filed in this matter where defendant not only acquiesced to trial on that charge but invited the error with his motion and argument.

A briefing schedule of the above issues by the parties to this appeal is hereby set as follows:

The State of Montana, plaintiff and respondent, shall file its opening brief within thirty days.

Franklin T. Hall, Sr., the defendant and appellant, shall file a response brief within thirty days of the filing of the brief of the State of Montana.

The State of Montana may file a reply brief within fifteen days of the filing of appellant's response brief.

DATED this 12th day of March, 1986.

For the Court,

By_____
Chief Justice

OPPOSITION

BRIEF

86 1381

NO. 87-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF MONTANA,

Petitioner,

vs.

FRANKLIN T. HALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Where there is an independent state ground for the decision of the Montana Supreme Court, does this Court have jurisdiction?

2. May a defendant convicted under ex post facto application of an amended statute be retried for the same charge under Montana law?

3. Should a determination of whether offenses are the "same" for purposes of double jeopardy analysis be based on identical statutory provisions or upon the facts of the incident?

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SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE MONTANA SUPREME COURT

OPINION BELOW

The opinion of the Montana Supreme Court is reported at 728 P.2d 1339. (Petitioner's App. Item 3). The decision was filed on December 2, 1986.

JURISDICTION

1. **The State Court based their decision on adequate and independent state grounds and this Court lacks jurisdiction.**

The Petitioner claims jurisdiction of this Court under 28 U.S.C. Section 1257 (3). The decision of the Montana Supreme Court does not involve a treaty or statute of the United States. The validity of a State statute is not drawn into question on the grounds that it is repugnant to the Constitution, treaties or laws of the United States. No title, right, privilege or immunity was especially set up or claimed under the Constitution, treaties or statutes of the United States. This Court therefore lacks jurisdiction.

The best discussion of the "adequate state grounds" issue is contained in Michigan v. Long, 463 U.S. 1032, 1037-1042, 77 L.Ed.2d 1201, 1212-1215 (1983). The standard now employed is as follows:

> "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the

> precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

The decision of the Montana Supreme Court is attached to Petitioner's Petition as Appendix Item 3. Petitioner claims the state decision is based solely on federal law or interwoven with federal law. Not so from the plain language of the decision. Note the following:

1. While the Montana courts note the application of the Fifth Amendment to the State, it notes "Furthermore" the Montana Constitution provision provides double jeopardy protection and sets the Montana language out in full.

2. The general standards for double jeopardy first cite with Montana decisions and then, if applicable, federal decisions.

3. The Montana Court proceeds to use the "Blockburger test" and appropriately finds double jeopardy, however, it is not Blockburger that requires dismissal.

4. The case is dismissed because "Furthermore" State v. Hembd, (1982) 197 Mont. 438, 643 P.2d 567, requires dismissal if one is convicted in Montana on a non-existent offense.

The Montana Supreme Court decision, on its face, does not rely on federal precedent as occurred in Michigan v. Long, supra, or Oregon v. Hass, 420 U.S. 714, 43 L.Ed.2d 570 (1975). Federal law is cited but only as guidance with consistent with Montana case law. The state decision is based solely on state law.

Under Michigan v. Long, supra, this Court lacks jurisdiction.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

These are cited in Petitioner's Petition.

STATEMENT OF THE CASE

Respondent shall agree, for the purposes of this Petition, to Petitioner's Statement of the Case, except to note:

1. Respondent timely filed alibi to the original information and since the complaining witness was 300 miles away from the alleged scene on June 3, 1983, the State amended.

2. Respondent proved that from June 29 to July 2, 1983, he was not in town. The State, at trial, abandoned any date claiming it was not essential to convict. This was one issue on appeal.

3. The State conceded the mother of the complaining witness and the Respondent were divorced in 1965 before the witness' birth and had never remarried. The State claimed a step-parent relationship because Respondent paid and helped the witness. This was a second issue on apapeal.

4. Defendant, on appeal, claimed the evidence was not sufficient to convict.

5. Respondent believes the Montana Supreme Court dismissed because under Montana law if one is convicted of a non-existent offense, under transactional double jeopardy, the case must be dismissed, State v. Hembd, supra.

ARGUMENT

THE STATE COURT PROPERLY HELD THAT DOUBLE JEOPARDY UNDER MONTANA LAW PRECLUDES RETRIAL OF A DEFENDANT AFTER BEING CONVICTED OF A NON-EXISTENT OFFENSE

This is not a case of a mere procedural defect. It is not a case of mistrial. This is not a case where the Defendant introduced any error into the record. This is a case in which the Defendant was convicted on an ex post facto application of the statute, and under Montana law double jeopardy applies, State v. Hembd, supra.

THE MONTANA SUPREME COURT PROPERLY DETERMINED THAT THE OFFENSES WERE "THE SAME OFFENSE" FOR DOUBLE JEOPARDY, ALTHOUGH THAT WAS NOT THE ONLY BASIS FOR DISMISSAL

Blockburger v. United States, 284 U.S. 304, 76 L.Ed. 309 (1932) states:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

Must the statutory elements be identical for this test as asserted by Petitioner? No! In Brown v. Ohio, 432 U.S. 161, 164, 53 L.Ed.2d 187, 193 (1977), this Court stated:

> "The double jeopardy clause of the Fifth Amendment, applicable to the states through the Fourteenth, provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' It has long been understood that

> separate statutory crime need not be identical - either in constituent elements or in actual proof - in order to be the same within the meaning of the constitutional prohibition. 1 J. Bishop, New Criminal Law Section 1051 (8th ed 1892); Comment, Twice in Jeopardy, 75 Yale L.J. 262, 268-269 (1965). . . ." (Emphasis Added)

Sexual Assault is a general offense which prohibits sexual contact between any person in society by any other person in society, regardless of the relationship between the alleged victim and the alleged offender.

Incest is a specific offense. As applicable to this proceeding, it prohibits sexual assault between certain related parties.

As applied to this case, a comparison is as follows:

	Sexual Assault	Incest
Mental State:	Knowingly	Knowingly
Act:	Sexual contact	Sexual contact
Victim:	Any person not offender's spouse (relative, step-child or stranger).	An ancestor, descendant brother or sister of the whole or half blood, or stepchild. (These people are not offender's spouse.)
Consent:	Ineffectual if victim is under 14 and offender is 3 years older than victim. (5)	Ineffectual if victim is less than 18 years old. (2)

In this case the alleged victim was 12 years of age and the Defendant was over 50. The Montana Supreme Court noted, as applied in this case, that the proof necessary to establish sexual assault and the proof necessary to establish incest are basically the

same. The Supreme Court further noted that the State of Montana conceded this fact in argument, where they argued:

> "The only difference between the two statues (incest and sexual assault) is whether or not in this case the defendant is the stepfather of the victim . . . In any case, the defendant is not put at any disadvantage by the fact that we have charged sexual assault instead of incest, simply because incest and sexual assault are identical with the exception of the family relationship involved."

The Montana Court concluded that Montana has adopted the "Blockburger test". In examining the two statutes involved, they are clearly the same and double jeopardy would bar any subsequent prosecution.

However, note that the Court continues on with its analysis. As this Court has held, the "Blockburger test" is <u>not</u> the only standard for determining whether successive prosecutions

impermissively involve the same offense. Brown v. Ohio, supra. Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2. 469, 90 S.Ct. 1189 (1970); In Re Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889). The above cases represent this Court's belief that the accused should not have to "'run the gauntlet' a second time." Green v. United States, 355 U.S. 184, 2 L.Ed.2d. 199, 78 S.Ct. 221 (1957).

It is clear that the Supreme Court of Montana, based upon the cases which have adopted the "Blockburger test", properly applied that test. It is further clear that the decision of the State Court is not based solely upon the "Blockburger test", but based additionally upon the fact that under Montana law double jeopardy applies where one is convicted of a crime which did not exist on the date of the charged offense. Therefore, the Supreme Court acted properly in finding the State double jeopardy clause to have applied and dismissing the charge.

CONCLUSION

Respondent specifically requests this Court to deny the Writ of Certiorari. This Court lacks jurisdiction because there is adequate state grounds for the decision. The State Court, as to the state adopted "Blockburger test", applied it properly. State case law, independent of the "Blockburger test", authorized this decision.

Respectfully submitted this 23rd day of February, 1987.

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ATTORNEYS FOR
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AMICUS CURIAE

BRIEF

86 1381

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF MONTANA,

Petitioner,

v.

FRANKLIN T. HALL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF OF THE STATES AND COMMONWEALTHS OF INDIANA, ALASKA, ARKANSAS, ARIZONA, IDAHO, LOUISIANA, MINNESOTA, MISSISSIPPI, MISSOURI, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING

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INTERESTS OF AMICI CURIAE

The State of Indiana, and the 16 other *amici* states and commonwealths, through their respective Attorneys General, appear on behalf of their citizens and file this brief pursuant to Rule 36 of the rules of this Court. The *amici curiae* administer criminal justice systems within their jurisdictions to promote

the safety and welfare of their citizens. The holding of the Supreme Court of Montana purports to construe the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, which applies to all states. The holding fails to preserve the integrity of the decisions of this Court, and threatens to establish an erroneous trend.

SUMMARY OF THE ARGUMENT

A defendant who succeeds on appeal in overturning his conviction on legal grounds may be retried on the same or a different indictment for the same conduct for which he was convicted. This fundamental exception to the prohibition of the Double Jeopardy Clause was entirely ignored by the Montana Supreme Court in the instant case. The fact that it was the State, rather than the defendant, that brought the error to the attention of the state appellate court should not result in a distinct rule of law, especially where the defendant introduced the error into the trial.

The Montana Supreme Court improperly shifted the focus of the *Blockburger* inquiry from the statutory elements of the two offenses onto the particular evidence adduced in the instant case. Correct analysis reveals that the offenses are separate and distinct, even assuming, *arguendo*, that the double jeopardy clause applies to a conviction reversed upon appeal.

The major errors in federal constitutional law which appear in the decision of the Montana Supreme Court require correction by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR RETRIAL WHERE THE CONVICTION WAS REVERSED BY AN APPELLATE COURT UPON CONFESSION OF LEGAL ERROR BY THE STATE.

The double jeopardy prohibition of the Fifth Amendment to the United States Constitution is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*,

395 U.S. 784 (1969). It serves as a restraint on courts and prosecutors so that the courts do not impose more than one punishment, and prosecutors do not attempt to secure that punishment in more than one trial. *Brown v. Ohio*, 432 U.S. 161 (1977). However, if a defect in the criminal proceedings occurs, the defendant in some circumstances may be subjected to a readjudication of his guilt, in order to advance society's concern for ensuring that the guilty are punished.

This Court has never wavered on the principle that a defendant who succeeds on appeal in having a judgment of conviction set aside for legal error "may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." *United States v. Ball*, 163 U.S. 662, 670 (1896). Therein, the convictions of two defendants had been previously reversed by this Court upon the ground that the indictment was fatally defective for failure to aver the time and place of death. Convictions were subsequently obtained upon new indictments against the defendants for the same offense. This Court rejected their plea of former jeopardy. Double jeopardy also does not apply where the defendant's conviction based upon his guilty plea was successfully attacked in collateral proceedings. *United States v. Tateo*, 377 U.S. 463 (1964).

Reversal for trial error does not constitute a decision that the government has failed to prove its case and does not imply anything with respect to the guilt or innocence of the accused.[1] *Burks v. United States*, 437 U.S. 1 (1978). It has made no difference whether the legal error was introduced into the proceedings by the defendant or by the State. In *Forman v. United States*, 361 U.S. 416 (1960), the defendant at trial requested the jury instruction which was later invalidated by

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[1] On the other hand, reversal by an appellate court for legal insufficiency of the evidence has been deemed the functional equivalent of an acquittal and therefore, bars retrial. *Burks v. United States*. The Montana Supreme Court did not find in the instant case an insufficiency of evidence to support the jury verdict, although *in dicta*, it alluded to, without citing, the *Burks* rule.

this Court, resulting in the overturning of the conviction. It was held that the defendant could be retried on a different theory. In *Strand v. United States*, 251 U.S. 15 (1919), the defendant was twice retried following reversals on appeal where the government confessed error, although the Court observed that the defendant had initiated the action of the appellate court, presumably meaning the defendant raised the errors as issues on appeal. In the pending case, Montana brought the defective information to the attention of the state appellate court, while the defendant initiated the appeal on other grounds. Such technicalities should not alter the principle that the defendant may be retried, even on a different theory, upon reversal of his conviction by an appellate court. To hold otherwise would discourage states from attempting to ensure that proper administration of justice. Requiring a criminal defendant "to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States v. Scott*, 437 U.S. 82, 91 (1978).

Had Montana herein discovered during the trial the impropriety of applying the amended incest statute in an *ex post facto* manner, the trial court properly could have dismissed the information or declared a mistrial. Whether the defect in the indictment was noticed by the defendant or Montana, under the decisions of this Court double jeopardy would not bar retrial. *Lee v. United States*, 432 U.S. 23 (1977); *Illinois v. Somerville*, 410 U.S. 458 (1973). Only if the underlying error were motivated by bad faith or undertaken to provoke a defense motion for mistrial would double jeopardy bar retrial. *Lee v. United States, supra* at 33. In this case the underlying error was introduced by the defendant upon his motion to dismiss the charge of sexual assault on the ground that the affidavit alleged facts which more correctly constituted the offense of incest. It was not determined until the appeal that the incest statute in effect at the time of the offense did not apply to the stepparent-stepchild relationship. Montana's

failure to discover the error at the time of the trial court's ruling was entirely reasonable in view of the eleventh-hour timing of the motion to dismiss. Under the circumstances, trial proceeded and the defendant was convicted by the jury.

The Montana Supreme Court opinion recites general principles of double jeopardy law, but erroneously omits consideration of the major exception to the doctrine carved out by this Court for reversals of convictions upon appeal. This egregious error of federal law requires review and reversal by this Court.

II. ANALYSIS OF OFFENSES FOR DOUBLE JEOPARDY PURPOSES IS TO BE BASED UPON STATUTORY ELEMENTS RATHER THAN UPON THE FACTS PECULIAR TO THE CASE.

The state appellate court, erroneously assuming the double jeopardy prohibition applies to a conviction reversed upon appeal, proceeded to analyze whether the offenses of incest and sexual assault were the same. The court focused its inquiry on the proof of facts peculiar to this case rather than on the statutory elements. In so doing, the court unnecessarily blurred the formulation of *Blockburger v. United States*, 284 U.S. 299 (1932), and *Brown v. Ohio*, 431 U.S. 161 (1977). This Court should grant the petition for a writ of certiorari in order to preserve the integrity of its decisions and to prevent incongruous results among the states.

Where the same conduct constitutes a violation of two distinct statutory prohibitions, the *Blockburger* test is used to determine whether there are two offenses or only one. The *Blockburger* test is "whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. at 304. Here, the offenses of sexual assault and incest are distinct. Each statute requires proof of a fact which the other does not. In proving sexual assault, the prosecution must establish that the spousal relationship does not exist and that the sexual conduct was without consent. § 45-5-502, Mont. Code Ann. In proving incest, the prosecution must establish that a particular legal relationship does exist

and that sexual contact, sexual intercourse, marriage, or cohabitation occurred. § 45-5-507, Mont. Code Ann.

Because on the facts of this case the defendant could have been convicted of both offenses, the State by section 46-11-502(4), Mont. Code Ann., was required to elect the charge on which it would proceed. The choice to proceed under the incest statute upon the defendant's motion lead to the error in the instant case where it was later discovered that the amendment to the incest statute which would have allowed the prosecution became effective subsequent to the incident. While defendant's conduct on July 2, 1983, was not criminal under the incest statute, it was criminal under the sexual assault statute. He has not been punished. Nothing in the Double Jeopardy Clause prohibits the State of Montana from now seeking to secure imposition of punishment for violation of the sexual assault statute. The state appellate court opinion is riddled with errors of federal constitutional law and must be corrected.

CONCLUSION

The amici states and commonwealths respectfully request this Court to grant the State of Montana's petition for a writ of certiorari. Major errors of federal constitutional law in the opinion of the Montana Supreme Court threaten to upset the harmony among the state decisions in this area of law.

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

MONTANA, PETITIONER *v.* FRANKLIN T. HALL, SR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 86-1381. Decided April 27, 1987

JUSTICE STEVENS, dissenting.

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983).

Perhaps the Court is correct in assuming that the decision of the Supreme Court of Montana does not rest on an adequate and independent state ground. Nevertheless, it is worthy of note that the state court expressly relied on Article II, § 25 of the Montana Constitution [1] and cited four decisions of the Montana Supreme Court in support of its double jeopardy holding.[2] Furthermore, after concluding that "the double jeopardy clause prohibits [respondents] retrial." —— Mont. ——, ——, 728 P. 2d 1339, 1342, (1986), the Montana court advanced an alternate ground for its decision that is supported only by the Montana case of *State* v. *Hembd*, 197 Mont. 438, 643 P. 2d 567 (1982), namely that retrial would be impermissible because respondent was convicted of an offense that did not exist when he committed the acts in question; this state law doctrine has no federal counterpart of which I am aware.

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[1] Article II, § 25 of the Montana Constitution provides:

"No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction."

[2] *State* v. *Lindseth*, 203 Mont. 115, 659 P. 2d 844 (1983); *State* v. *Wells*, 202 Mont. 337, 658 P. 2d 381, (1983); *State* v. *Hembd*, 197 Mont. 438, 643 P. 2d 567 (1982) *State* v. *Parmenter*, 112 Mont. 312, 116 P. 2d 879 (1941).

My respect for the independence of state courts, as well as the desirability of not rendering opinions that may turn out to be wholly advisory, therefore persuades me that the Court's summary disposition is unwise. See, *e. g.*, *People* v. *P. J. Video, Inc.*, 68 N. Y. 2d 296, 501 N. E. 2d 556 (1986) (declining to follow *New York* v. *P. J. Video, Inc.*, 475 U. S. —— (1986)), cert. denied, 479 U. S. —— (1987); *Commonwealth* v. *Upton*, 394 Mass. 363, 476 N. E. 2d 548 (1985) (declining to follow *Massachusetts* v. *Upton*, 466 U. S. 727 (1984)); *Bellanca* v. *New York State Liquor Authority*, 54 N. Y. 2d 228, 429 N. E. 2d 765 (1981) (declining to follow *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981)), cert. denied, 456 U. S. 1006 (1982); *State* v. *Opperman*, 247 N. W. 2d 673 (S. D. 1976) (declining to follow *South Dakota* v. *Opperman*, 428 U. S. 364 (1976)).

I would simply deny Montana's petition for a writ of certiorari.

OPINION

SUPREME COURT OF THE UNITED STATES

MONTANA *v.* FRANKLIN T. HALL, SR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 86–1381. Decided April 27, 1987

PER CURIAM.

In 1984 the State of Montana filed an information in the Yellowstone County District Court charging respondent with felony sexual assault in violation of Mont. Code Ann. § 45–5–502 (1981). The affidavit in support of the information indicated that the assault took place during the summer of 1983, and that the victim was the daughter of respondent's ex-wife. The victim was 12 years old at the time of the offense. Four days before trial, respondent filed a motion to dismiss the information, arguing that because the victim was his stepdaughter he could be prosecuted only for incest, under Mont. Code Ann. § 45–5–507 (1983), not sexual assault. Respondent argued that incest was merely a specific instance of sexual assault, and that the Montana Legislature had not intended incestuous acts to be subject to prosecution under the more general sexual assault statute. On the morning of the trial, the State District Court held a hearing and then granted the motion. The State promptly filed a new information charging respondent with incest, and proceeded to trial. A jury convicted respondent. The judge sentenced respondent to 10 years imprisonment, but suspended 5 years of the sentence.

Respondent appealed his conviction to the Montana Supreme Court, raising a number of claims not directly relevant to the issue before this Court. One of respondent's claims was that he could not lawfully be convicted of incest because the victim was not his stepdaughter within the meaning of the Montana incest statute. In the course of considering this claim, the State discovered that at the time

of the assault the incest statute had not applied to sexual assaults against stepchildren. The amended statute under which respondent was tried had not become effective until October 1, 1983, three months after the assault in question. On March 5, 1986, the State filed a motion bringing this matter to the attention of the Montana Supreme Court.

After briefing on the questions raised by the State's motion, the Montana Supreme Court concluded that the conviction was void because retroactive application of the amended statute would violate the ex post facto law prohibition of the Montana Constitution, Mont. Const. Art. II, § 31. It also held that the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution prohibited retrial of respondent. It stated that "[i]f the offense charged in the second trial is the same in law and fact as the offense charged in the first trial, the double jeopardy clause prohibits successive trials." —— Mont. ——, ——, 728 P. 2d 1339, 1340 (1986) (citing *Brown* v. *Ohio*, 432 U. S. 161, 167, n. 6 (1977)). The court then analyzed the elements of sexual assault and incest and concluded that they were the same offense for double jeopardy purposes. Relying on this conclusion and *Brown* v. *Ohio*, it held that the Double Jeopardy Clause barred retrial. As an alternative ground of decision, it noted that respondent "was convicted of a crime which did not exist on the date of the charged offense." —— Mont., at ——, 728 P. 2d, at 1342. In the court's view, a retrial after a conviction for committing a nonexistent crime also would subject respondent to double jeopardy.

It is a "venerable princip[e] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, *Burks* v. *United States*, [437 U. S. 1 (1978)], poses no bar to further prosecution on the same charge." *United States* v. *Scott*, 437 U. S. 82, 90–91 (1978). See generally 3 W. LaFave & J. Israel, Criminal Procedure § 24.4 (1984). Justice Harlan explained the basis for this rule:

> "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964).

See *Burks* v. *United States*, *supra*, at 15.

Although Montana's ex post facto law clause prevents Montana from convicting respondent of incest, we see no reason why the State should not be allowed to put respondent to a trial on the related charge of sexual assault. There is no suggestion that the evidence introduced at trial was insufficient to convict respondent. See *Burks* v. *United States*, *supra*.[1] Montana originally sought to try respondent for sexual assault. At respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

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[1] Nor was the jury's conviction of respondent on the charge of incest an implied acquittal of the offense of sexual assault; there would have been an implied acquittal only if the jury had been presented with charges of both sexual assault and incest and had chosen to convict respondent of incest. See *Green* v. *United States*, 355 U. S. 184 (1957).

The principal federal authority relied on by the Montana Supreme Court was our decision in *Brown* v. *Ohio*, *supra*. The petitioner in that case had been convicted of joyriding. After serving a term of imprisonment on that conviction, he was charged with auto theft. We concluded that the charges of joyriding and theft punished a single offense, and thus that retrial was impermissible. But the *Brown* analysis is not apposite in this case.[2] In *Brown*, the defendant did not overturn the first conviction; indeed, he served the prison sentence assessed as punishment for that crime. Thus, when the State sought to try him for auto theft, it actually was seeking a second conviction for the same offense. By contrast, the respondent in this case sought, and secured, invalidation of his first conviction. This case falls squarely within the rule that retrial is permissible after a conviction is reversed on appeal.

The Montana court also suggested that the Double Jeopardy Clause would forbid retrial because respondent was convicted of an offense that did not exist when respondent had committed the acts in question. But, under the Montana court's reading of the Montana sexual assault statute, respondent's conduct apparently was criminal at the time he engaged in it. If that is so, the State simply relied on the wrong statute in its second information. It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument. *E. g.*, *United States* v. *Ball*, 163 U. S. 662, 672 (1896).

We grant Montana's petition for a writ of certiorari[1] and

[2] We explicitly noted in *Brown* that the case did not raise "the double jeopardy questions that may arise . . . after a conviction is reversed on appeal." 432 U. S., at 165, n. 5.

[1] As JUSTICE STEVENS implicitly acknowledges, we have jurisdiction over this petition under 28 U. S. C. § 1257(3). The Montana court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

reverse the judgment of the Montana Supreme Court.[1] The case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN would deny the petition for certiorari.

[1] We express no opinion on the correctness, as a matter of federal constitutional law, of the Montana Supreme Court's conclusion that sexual assault and incest are the "same" offenses.

OPINION

SUPREME COURT OF THE UNITED STATES

MONTANA *v.* FRANKLIN T. HALL, SR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 86-1381. Decided April 27, 1987

JUSTICE MARSHALL, dissenting.

For years, I have been troubled by our disposition of appeals and petitions for certiorari through summary *per curiam* opinions, without plenary briefing on the merits of the issues decided.[1] Other Justices have registered similar objections, disputing the Court's application of the criteria that supposedly determine when a summary disposition is clearly justified.[2] Our persistent indulgence in this practice over the objections of our colleagues has tarnished what has long been considered one of this judicial institution's greatest qualities, the fairness and integrity of its decision-making process.

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[1] See, *e. g.*, *Allen* v. *Hardy*, —— U. S. ——, —— (1986) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120 (1983) (MARSHALL, J., dissenting); *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 62 (1982) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 50 (1982) (MARSHALL, J., dissenting); *Harris* v. *Rivera*, 454 U. S. 339, 349 (1981) (MARSHALL, J., dissenting); *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (MARSHALL, J., dissenting); *Harris* v. *Rosario*, 446 U. S. 651, 652 (1980) (MARSHALL, J., dissenting); *Smith* v. *Arkansas State Highway Employees*, 441 U. S. 463, 466 (1979) (MARSHALL, J., dissenting).

[2] See, *e. g.*, *Board of Education of Rogers* v. *McCluskey*, 458 U. S. 966, 971–972 (1982) (STEVENS, J., dissenting); *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 271 (1982) (BLACKMUN, J., dissenting); *Hutto* v. *Davis*, 454 U. S. 370, 387 (1982) (BRENNAN, J., dissenting); *Stone* v. *Graham*, 449 U. S. 39, 47 (1980) (REHNQUIST, J., dissenting); *Oregon State Penitentiary* v. *Hammer*, 434 U. S. 945, 947 (1977) (STEVENS, J., dissenting); *Eaton* v. *City of Tulsa*, 415 U. S. 697, 707 (1974) (REHNQUIST, J., dissenting); cf. *Shipley* v. *California*, 395 U. S. 818, 821 (1969) (WHITE, J., dissenting).

Through summary dispositions, we deprive the litigants of a fair opportunity to be heard on the merits. Our Rules tell the petitioner and respondent that we will grant review on writ of certiorari "when there are special and important reasons therefore."[3] In listing the considerations that are important in deciding whether review should be granted, we mention such things as conflicting decisions from other courts and unsettled questions of federal law. We do *not* indicate that the parties should address the merits of the lower court's decision beyond what is necessary to demonstrate whether the case is important enough to receive plenary review.[4] Our 30-page limit for petitions and responses, and the command that they be "as short as possible,"[5] unmistakably indicate that these papers should not contain detailed discussions of the merits. If we find the case sufficiently important, the Rules inform the parties that the petition will be granted and "[t]he case will stand for briefing and oral argument."[6] Yet when we issue a summary disposition we ignore these instructions and proceed to decide the case as if it has been fully briefed on the merits. In my view, simply put, this is not fair.[7]

Admittedly, the Rules indicate that summary dispositions on the merits are possible,[8] but in light of our instructions

[3] Supreme Court Rule 17.1.

[4] Supreme Court Rule 22.1.

[5] Supreme Court Rules 21.4 and 22.2. In this case, petitioner devoted twelve pages to the merits of the double jeopardy issue decided by the Court today, the respondent only seven. Brief for Petitioner 10–21; Brief for Respondent 8–14. An *amicus curiae* brief submitted on behalf of seventeen states devoted a total of five pages to the merits. Brief for the States and Commonwealths of Indiana, et al. as *Amicus Curiae* 2–6.

[6] Supreme Court Rule 23.2.

[7] This lack of fairness has not escaped the notice of commentators. See, *e. g.*, E. Brown, *Forward: Process of Law*, 72 Harv. L. Rev. 77, 80, 82, (1958); R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice 284–285 (6th ed. 1986).

[8] Supreme Court Rule 23.1. This Rule was not codified until 1980. R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice, *supra*, at 277.

regarding the preparation of petitions and responses this places the litigants in a difficult dilemma. If they venture beyond arguments for granting or denying certiorari, they risk violating the Rules; but if they fail to cover the merits of the lower court's decision *in full*, they risk summary disposition without having been heard.[9] In response to these pressures, counsel may tend to extend their arguments in petitions and responses beyond the purposes defined in the Rules. Apart from increasing the litigants' costs, this tendency can only increase our workload, thereby giving those who favor uncounseled summary dispositions additional justification for not allowing full briefing on the merits.[10]

Not only do we reach these summary dispositions without the benefit of thorough briefing, the Court often acts without obtaining the complete record of the proceedings below. Records are no longer automatically certified and delivered to us for every petition.[11] In fact, we expressly discourage transmission of the record at this stage of the proceedings,[12] which again indicates that the focus of certiorari is on whether a case is important enough to warrant plenary review and not whether, after abbreviated review, we are able to conclude that the case was rightly or wrongly decided below. Of course, we may call for the record where we think a summary disposition might be proper, and our Clerk notifies the parties of this development, but we do not provide for supplemental briefing on the merits.[13] All too often, as in

[9] Cf. *United States* v. *Hollywood Motor Car Co.*, *supra*, at 271 (BLACKMUN, J., dissenting).

[10] See *Hutto* v. *Davis*, *supra*, at 387, n. 6 (BRENNAN, J., dissenting); R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice, *supra*, at 286.

[11] See generally R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice, *supra*, at 329–333.

[12] Supreme Court Rule 19.1.

[13] A party may, at any time, file a supplemental brief not exceeding 10 pages, but these briefs can only address a "new matter" not available at the time of the party's last filing. Supreme Court Rule 22.6. This Rule does not envision supplemental briefing when the Court calls for the record.

the case decided today, the Court does not even bother to call for the record. Again, counsel face a dilemma: they may routinely request that records be transmitted, thus protecting the interests of their clients at the risk of violating the Rules, or they may fail to request transmission and risk summary disposition based less than complete review.

I cannot accept the proposition that additional briefing and review of the full record will increase the workload of this Court unbearably. Our duty to litigants today is to consider carefully every petition and response filed in this Court. But our duty extends to future litigants as well, and it is heightened when we issue written opinions. To reduce the incidence of mistakes and to avoid delivering conflicting or confusing opinions, our decisions in these cases should be made only after we have had an opportunity to consider comprehensive briefs and review the records in their entirety. We are not infallible, as evidenced for example by the number of cases each Term that are dismissed *after* plenary briefing and oral argument as having been improvidently granted. The time and effort required to read supplemental briefs in cases for which we are considering summary dispositions would be minimal,[14] and the relative gains substantial.

More is at stake, however, than offsetting the litigants' entitlement to be heard on the merits against our desires to avoid increasing the workload. Summary dispositions often

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See also Supreme Court Rule 21.3 (supplemental brief in support of petition will not be received).

[14] To put matters in perspective, were we to shorten the acceptable length of petitions and responses merely by 1/5 of a single page, it would free up at least 2,000 pages worth of our reading time to consider full briefs for the relatively few summary dispositions we issue each year. That comes to 40 briefs, at 50 pages each, or 20 cases decided in which the parties and the Court would have the benefit of full briefing. This assumes that 5,000 petitions are filed each year, and that on average litigants use the complete 30 pages allowed. The former assumption is conservative and is a matter of record; based on my personal observation the latter assumption is more than fair.

do not accord proper respect for the judgments of the lower courts, particularly when these judgments are reversed.[15] The judges below *have had* the benefit of full briefing on the merits and review of the entire record. They must perceive—correctly—that our cavalier reversals are inherently less well-informed.

I believe, moreover, that summary dispositions in many instances display insufficient respect for the views of dissenting colleagues on *this* Court. The tendency is to forget that we are equally uninformed. What troubles a single Justice about a particular case may become, after full briefing, a decisive factor in the judgment of the Court. As it is, we forge ahead issuing *per curiam* opinions as if the issue were crystal clear, at times over objection from as many as four other Justices.[16] It is not unreasonable to believe, as I do, that the integrity of a summary decision from a divided Court would benefit from additional briefing on the merits by those who have litigated the issues of the case from its inception.

"*Per curiam*" is a Latin phrase meaning "By the Court,"[17] which should distinguish an opinion of the *whole* Court from an opinion written by any one Justice. Our use of lengthy *per curiam* opinions, over the dissent of those who would set the case for briefing, to resolve the merits of a case without devoting the usual time or consideration to the issues presented, is wrong. Such an opinion does not speak for the entire Court on a matter so clear that the Court can and should speak with one voice. Instead, it speaks for a majority of Justices who take it upon themselves to resolve the merits of a dispute solely on the basis of preliminary petitions and responses.

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[15] See, *e. g.*, *Stone* v. *Graham*, *supra*, at 47 (REHNQUIST, J., dissenting); *Oregon State Penitentiary* v. *Hammer*, *supra*, at 947 (STEVENS, J., dissenting).

[16] See, *e. g.*, *City of Newport* v. *Iacobucci*, —— U. S. —— (1986).

[17] Black's Law Dictionary 1023 (5th ed. 1979) (emphasis added).

I can think of no compelling reason, and to date none has been suggested, why we should nurture a practice that can only foster resentment, uncertainty, and error. Rather, I believe that when the Court contemplates a summary disposition it should, at the very least, invite the parties to file supplemental briefs on the merits, *at their option*. This simple accommodation to the reasonable expectations of the litigants, to the integrity of the lower courts, and to the desires of other Justices for a more studied decision would go a long way toward achieving the fairness and accuracy that the nation rightfully expects from its Court of last resort. Until this, or some other, reasonable accommodation is implemented, I remain in dissent.